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In The

Supreme Court of the United States

October Term, 1997

DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO AND ITS LOCAL LODGES 883, 1088, AND 1142,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BROWN & SHARPE MANUFACTURING COMPANY,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF BROWN & SHARPE MANUFACTURING COMPANY

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RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Court's rules, counsel for Intervenor certify the following:

Inervenor Brown & Sharpe Manufacturing Company is a publicly-owned corporation organized under the laws of the State of Delaware for all lawful purposes, and is affiliated with the following entities:

Joint Venture Companies Affiliated

1. Automation Software Incorporated, a Delaware corporation (50% owned by Brown & Sharpe; 50% owned by Analysis & Technology, Inc.); 9/16/85

2. Brown & Sharpe – Precizika, a joint venture company formed under the laws of the Republic of Lithuania; 6/13/91 (52.8% owned by BSP, Inc.; 43.2% owned by the ENIMS Institute, Vilnius Branch; and 4% owned by Euromedika, Inc., a Massachusetts corporation.)

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COUNTER STATEMENT OF THE CASE

Intervenor concurs with the recitation of the Statement of the Facts and Procedural History set forth in Petitioners' Petition For A Writ Of Certiorari (hereinafter, "Petition"), except as follows.

In its second supplemental decision, the National Labor Relations Board (hereinafter "Board") expressly rejected Petitioners' assertion that a charged party who cooperates with an investigation by the General Counsel has an obligation to produce, on its own initiative, an item that was not requested by the General Counsel. *Brown & Sharpe Mfg. Co.*, 321 NLRB 924, 925 (1996) (hereinafter *"Brown & Sharpe III"*).

Further, both the Board and the court of appeals rejected Petitioners' assertion that by providing all information and documents requested, Brown & Sharpe deliberately misled the Board investigator into believing that the company had provided all information and documents arguably relevant to the investigation. There is no evidence that Brown & Sharpe either lied or misled the investigator, deliberately or otherwise. As observed by the court of appeals, "[m]ost telling is the fact that if Brown & Sharpe had intended its participation as a ruse to distract the investigator from the steering committee documents, it seems doubtful that it would have acknowledged the existence of the steering committee at all." *District Local 64 v. NLRB*, 130 F.3d 1083, 1088 (D.C. Cir. 1997). Further, there is substantial evidence in the record to support the Board's finding that Brown & Sharpe in no way masked the contents of the Steering Committee notes. In this regard, the court of appeals

highlighted the record evidence that the General Counsel's investigator testified that it was not his usual practice to ask companies for documents showing how they arrived at their bargaining positions. *Id.*

REASONS FOR DENYING THE WRIT

I. Two Of The Questions Presented In The Petition For Certiorari Were Neither Raised Below Nor Addressed By The Court Of Appeals.

This Court has often stated that certiorari should not be granted where "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992); *see also Yee v. Escondido*, 503 U.S. 519, 533 (1992). In this case, two of the questions presented in the Petition were neither raised by Petitioners below nor addressed by the court of appeals and, accordingly, have been waived. The two questions are: Question A: "Does the National Labor Relations Board have *authority* to interpret and apply equitable tolling provisions of borrowed federal statute of limitation in a way that conflicts with relevant decisions of federal courts?" and Question D: "Where reasonably possible, must the National Labor Relations Board take affirmative steps to avoid the extinction of rights granted under the National Labor Relations Act which may be caused by the board's own acts of negligence?" Petition at i (emphasis added).

As to the first question presented, Petitioners argue that the Board lacks the authority to fashion its own version of the equitable tolling doctrine as applied to the untimely reinstatement of previously dismissed unfair

labor charges, citing this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983).[1] Specifically, Petitioners argue that the Board was without authority to reject "the glosses on the fraudulent concealment doctrine set forth by various Federal courts." Petition at 14.

This case commenced approximately seventeen years ago and has involved two decisions by an administrative law judge, three decisions of the National Labor Relations Board and three decisions of the court of appeals. While the Union clearly had ample opportunity to raise the issue of the Board's authority to fashion its own standard for fraudulent concealment, at no time did it do so.

Petitioners' "Summary of Argument" in its final brief in support of its Petition for Review from the Board's second supplemental decision includes:

> Brown & Sharpe should be tried for bad faith bargaining because its fraudulent concealment of operative facts tolled the applicable period of limitations. The NLRB misconstrued and misapplied Circuit case law when it condoned Brown & Sharpe's knowing attempt to mislead the Board Investigator about the existence and significance of secret company documents. The Complaint should be reinstated and the cause remanded for trial.

In that petition for review, Petitioners argued to the appeals court that while the Board purported to adopt

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[1] As fully set forth below, the *DelCostello* decision does not support Petitioners' argument. That case is wholly inapposite to the instant matter.

that court's standard for defining fraudulent concealment, it was unfaithful to that standard. At no time did Petitioners argue that the Board lacked the authority to fashion its own standard. This is a significant difference. At no point, when before the appeals court, did Petitioners challenge the Board's *authority* to fashion an appropriate standard for determining when or if fraudulent concealment would toll the six-month limitation period on the reinstatement of variously dismissed unfair labor practice charges. Nor did Petitioners ever argue below that the court of appeals should decline to defer to the standard adopted by the Board on the grounds that it was unreasonable. Rather, Petitioners have consistently argued that the Board made erroneous findings of fact and misconstrued its own adopted standard.

Moreover, the court of appeals did not, on its own initiative, address the issue of the Board's authority to devise its own fraudulent concealment standard. The court summarized Petitioners' argument and its holding as follows:

> While not contending that the Board adopted an erroneous legal standard for fraudulent concealment, [Petitioner] maintains that the Board misconstrued and misapplied this court's precedent when it found that Brown & Sharpe had not fraudulently concealed the steering committee documents. We find no basis to overturn the Board's legal decision that an affirmative act of concealment was necessary to trigger the exception in the *Ducane* rule. Nor do we find any basis on which to overturn the Board's factual determination in applying this rule that there was no such act.

District Local 64, 130 F.3d at 1087. Thus, it is clear that Petitioners waived the argument that the Board lacked the authority to fashion an appropriate standard for fraudulent concealment.

Similarly, Petitioners failed to raise in the proceedings below, and the court of appeals did not address the fourth question presented, "[w]here reasonably possible, must the National Labor Relations Board take affirmative steps to avoid the extinction of rights granted under the National Labor Relations Act which may be caused by the board's own acts of negligence?" Petition at i. As set forth above, Petitioners' arguments in support of their petition for review below were limited to attacking the Board's application and construction of its standard for fraudulent concealment. Question D. raises an issue notably absent from both the final brief and reply brief filed by Petitioners in support of their petition for review of the second supplemental decision and order of the Board.

Simply put, because the Administrative Law Judge, the Board and the court of appeals have all rejected such arguments as Petitioners saw fit to make below, Petitioners now argue for the first time in their petition to this Court, that the Board lacks the authority to fashion a reasonable standard of fraudulent concealment which arguably may not wholly comport with standards developed by federal courts regarding fraudulent concealment in other contexts. Thus, Petitioners are attempting to inject new issues into this case at this late stage, thereby depriving this Court of the benefit of the court of appeals' refinement and resolution of such issues. Because this Court has ruled that certiorari is inappropriate to decide

questions presented which were not pressed or passed upon below, certiorari should be denied in this case. *Yee*, 503 U.S. at 533.

II. Even If The Issues Were Properly Preserved, The Alleged Conflicting Cases Relied Upon By Petitioners Are Distinguishable On The Law.

A. The Decision Below Does Not Conflict With *DelCostello*.

Petitioners assert that certiorari should be granted because the decision of the court of appeals conflicts with the holding in *DelCostello*. Specifically, Petitioners assert that because the Board applied the six-month limitations period of Section 10(b) of the National Labor Relations Act (hereinafter "NLRA")[2] and the implied equitable tolling doctrine of fraudulent concealment to dismissed charges reinstated under Section 3(d) of the NLRA,[3] the Board was constrained by *DelCostello*, to adopt "the glosses on the fraudulent concealment doctrine set forth by the various Federal Courts." Petition at 3 (quoting *Brown & Sharpe Mfg. Co.*, 312 NLRB 444 n.3 (1993) (hereinafter, *Brown & Sharpe II*)). Petitioners' reliance on *DelCostello* is misplaced and their argument is wholly without merit.

DelCostello resolved the issue of whether federal courts should apply state statutes of limitations or the six-month statute of limitations of Section 10(b) of the

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[2] 29 U.S.C. § 160(b).

[3] 29 U.S.C. § 153(d).

NLRA to breach of collective bargaining agreement/fair representation hybrid claims. The Court held that the § 10(b) six-month limitations period applies, reasoning that the six-month limitations period is more closely analogous to the federal claims than the available state limitations periods. *DelCostello*, 426 U.S. at 169-70.

The *DelCostello* Court was not presented with the issue of the extent of a federal agency's authority, in the face of congressional silence, to adopt a limitations period, including an implied equitable tolling provision, or to construct an appropriate standard for the equitable tolling provision. *DelCostello* does not address the authority of federal agencies at all. The sole question presented concerned the appropriate source from which to borrow a statute of limitations where there is no statute expressly applicable to a federal claim.[4] It would strain the bounds of logic to extend the holding in *DelCostello* to the present case. Such an application of *DelCostello* was neither considered nor contemplated by this Court.

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[4] Justice Brennan, speaking for the *DelCostello* Court, framed the issue as follows:

> Each of these cases arose as a suit by an employee or employees against an employer and a union, alleging that the employer had breached a provision of a collective bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings. . . . The issue presented is what statute of limitations should apply to such suits.

DelCostello, 462 U.S. at 154.

B. The Decision Below is Consistent With *Chevron* And Its Progeny.

In *Ducane Heating Corp.*, 273 NLRB 1389 (1985), *enforced without op.*, 785 F.2d 304 (4th Cir. 1986), the Board held that a dismissed charge may not be reinstated outside of the six-month limitations period of § 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. *Ducane*, 273 NLRB at 1390. In *District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991), the court of appeals upheld the *Ducane* rule as a permissible interpretation of § 10(b) of the Act. The court noted that "neither § 10(b) nor any other provision of the Act addresses the issue of time limits on revival of a dismissed charge." *District Lodge 64*, 949 F.2d at 445. The court stated that "[t]he statute's silence . . . clearly means that Congress has not 'directly spoken to the precise question at issue,' so that the Board is free to adopt any reasonable construction of the Act." *Id.* at 444 (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984)). The Court found that the Board's holding in *Ducane* reasonably promoted the policies underpinning § 10(b) of the Act:

> And we agree with the Board that Ducane reasonably promotes the policy of repose that § 10(b) contemplates. The rule gives charged parties "assur[ance] that, absent the existence of a properly served charge on file, [they] will not be liable for conduct occurring more than 6 months earlier," Ducane, 273 NLRB at 1391, and that they will not be called upon to defend themselves against stale charges "'after records

> have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.' " . . .

District Lodge 64, 949 F.2d at 445.

The court remanded the case to the Board, however, to clarify the application of the fraudulent concealment exception to equitable tolling in this case. The court expressly noted that the Board was free to fashion its own standard regarding fraudulent concealment; it need not adopt the standard of the District of Columbia Circuit. *Id.* at 449. In its first supplemental decision and order, the Board adopted the standard of the District of Columbia Circuit for "material facts" but, significantly, did "not adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts," thereby reserving the opportunity to diverge from the District of Columbia Circuit precedents in the future. *Brown & Sharpe II*, 312 NLRB at 444 n.5. In its second supplemental decision and order, the Board articulated its standard for determining when "fraudulent concealment" as the term was used in *Ducane* had occurred. It ruled that fraudulent concealment could not be found absent an affirmative act of concealment. The Board rejected the argument that a charged party commits fraudulent concealment (whether it knows it or not) each time it does not, on its own initiative, produce information or documents not requested by the General Counsel. *Brown & Sharpe III*, 321 NLRB at 924-25.

As set forth above, Petitioners did not raise and the court of appeals did not address whether the Board adopted an impermissible legal standard for fraudulent concealment. Even if the issue had been properly raised,

it is clear that the Board's formulation of fraudulent concealment was reasonable and, therefore, entitled to deference by the Court.

Addressing the Board Chairman's dissenting opinion as to the appropriate scope of the fraudulent concealment exception to equitable tolling, the majority wrote:

> We believe that this view is impractical and would actually hinder the Board's investigatory process. As the judge stated, a respondent in an unfair labor practice investigation is under no obligation to cooperate with the General Counsel in the investigation of the unfair labor practice charges, and may choose to supply no information whatsoever, if it so desires. Establishing a policy that holds a respondent open to a later charge of fraudulent concealment if it does not disclose unrequested information that relates to the investigation of an unfair labor practice charge is counterproductive. Many respondents may understandably decide that cooperating with the General Counsel's investigation is too onerous, in which case the Board's Regional Offices will be forced to put forth the time and expense of securing an investigatory subpoena in order to determine whether to issue a complaint.

Brown & Sharpe III, 321 NLRB at 924-25. The Board added that "where the General Counsel requests or subpoenas certain information and a respondent falsely denies that such information exists, deliberate concealment can be found." *Id.* Similarly, it wrote, "if a respondent affirmatively represented that it was providing *all* relevant material, while actually withholding certain information," a finding of deliberate concealment would be warranted. *Id.* (emphasis in original).

Petitioners cite authorities setting forth the standard, in other contexts, for fraudulent concealment which they assert "state the better principle" than the standard articulated by the Board.

However, as this Court held in *Chevron*,

> if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 843. "Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992).

Petitioners' asserted basis for certiorari is essentially that the Board should have adopted a different standard for fraudulent concealment. In light of the deference that must be accorded to the Board's reasonable interpretations of the Act and the important public policies underpinning the Board's standard for fraudulent concealment, Petitioners' argument does not warrant consideration by this Court and, thus, certiorari should be denied.

III. Question C., As Presented, Is No More Than A Request Of This Court To Revisit the Board's Findings of Fact.

Petitioners' third Question Presented is as follows:

> Where the National Labor Relations Board failed to consider material evidence indicating that a charged party gave an investigator a false impression of full and voluntary cooperation,

> when in fact the charged party withheld material evidence, did the court of appeals erroneously defer to the board's determination that the charged party did not engage in an affirmative act of concealment?

Petition at i.

In essence, Petitioners ask this Court to review the lengthy record to see if it can find what an administrative law judge, the Board and the court of appeals all have been unable to find – proof of an affirmative act by Brown & Sharpe to fraudulently conceal the steering committee minutes. Supreme Court Rules and this Court's precedent establish that certiorari should not be granted to review evidence and discuss specific facts. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

Even if this Court were to review the record (which Intervenor maintains is inappropriate), it would be clear that there is substantial evidence of record which supports the decision of the court of appeals to uphold the findings of fact and conclusions of law of the Board.

The evidence adduced before the Administrative Law Judge conclusively established that Brown & Sharpe committed no affirmative act of concealment whatsoever. There is absolutely no evidence of record to support Petitioners' representation in their brief to this Court that

"the board's own investigator was duped by the company's misrepresentations into not asking the right questions."[5] Petition at 13.

To the contrary, it was "no secret" that the Steering Committee held meetings to prepare for negotiations. (Tr. at 1093, 1121 (testimony of Waterman), App. at 435, 436.) Prior to the expiration of the § 10(b) limitations period, *both the Union and the General Counsel* were aware of the existence of the Steering Committee. Field Attorney Kevin Murray, who investigated the case, testified as follows:

> Q Do you remember how long after the charge was filed that you met with Mr. Thayer?[6]
>
> A I believe it may have been less than a week. I think I met with Mr. Thayer at least twice before I wound up meeting with the company in this case.
>
> . . . .
>
> Q Now, when you met with Mr. Thayer, do you recall if there was any discussion or any mention of a steering committee?
>
> A I believe at least at some point during the first two meetings, when I was going over with [Mr. Thayer] the background of the

---

[5] Petitioner here, as below, consistently has recourse to pejoratives such as "duped," "intentionally misled," "lied," "ruse," apparently on the assumption that these characterizations, if repeated often enough, will compensate for the absence of any evidence whatever that the Company deliberately withheld information from the investigation.

[6] Robert Thayer was the Business Representative for the Union. (Tr. at 301, App. at 343.)

company and its relations with the union, I think he mentioned to me that there was something that the company had in this negotiation that they hadn't had in prior negotiations, and he called it a steering committee.

Q Did he explain further what was his problem with the steering committee or define it?

A My understanding at that time was that it had some kind of oversight functions over the negotiations, that Dick Jocelyn was the chief negotiator and that he in some fashion reported to or was supervised by the steering committee. . . .

(Tr. at 1007-1008, App. at 412-13.)

Thus, the field attorney investigating the charges knew that the Steering Committee had a role in the negotiation process, yet failed to inquire as to its specific role and whether it kept minutes or other documents. (Tr. at 1012-1015, 1127, App. at 417-42, 437.) Simply put, as found by the ALJ, "[t]here was no misstatement . . . because important questions were never asked and pertinent information was never demanded." (SD&O II, App. at 429, 437.)

Significantly, Petitioners do not argue and the record evidence does not establish that Brown & Sharpe ever denied the existence of the Steering Committee notes. To the contrary, as found by the Board and as supported by the record, when the General Counsel asked for the notes at issue, Brown & Sharpe promptly produced the evidence. (Tr. at 1041, 1127, App. at 429.) However, as the Board concluded, Brown & Sharpe was under no duty to

spontaneously produce the Steering Committee documents prior to that request. Thus, Brown & Sharpe committed no fraud in not volunteering these documents, and the Court of Appeals properly upheld the Board's dismissal of the charges here at issue.

Finally, Petitioners do not argue and the evidence of record does not establish that Brown & Sharpe ever stated that it was providing *all* relevant material. Rather, Brown & Sharpe provided all *requested* material. The evidence establishes that, during the initial investigation, the field attorney's request was limited to all notes taken during the negotiation sessions and all correspondence exchanged by the parties, which Brown & Sharpe promptly provided. (Tr. at 1010, App. at 415.)

Thus, the evidence of record establishes that (1) the General Counsel knew of the Steering Committee and that it held meetings, (2) upon learning of the Steering Committee, the General Counsel did not request the Steering Committee minutes, (3) Brown & Sharpe was under no obligation to disclose, *sua sponte*, unrequested information, (4) Brown & Sharpe never denied the existence of the Steering Committee minutes, (5) Brown & Sharpe never represented that it had given all arguably material evidence, and (5) when asked for the minutes, Brown & Sharpe promptly disclosed them. How then was the General Counsel "duped" by Brown & Sharpe?

Contrary to the assertions by Petitioners, the Board's standard for fraudulent concealment which requires an affirmative act of misrepresentation is reasonable. Mere silence or failure to reveal information which the non-

disclosing party has no duty to disclose can never support a finding of fraudulent concealment.

Petitioners' allegation of fraudulent concealment is based solely on Brown & Sharpe's failure to turn over, on its own initiative, unrequested Steering Committee notes. Because Brown & Sharpe was under no duty to reveal this information, absent a request by the General Counsel, and because there is no evidence whatsoever that Brown & Sharpe made affirmative misrepresentations to the General Counsel, the court of appeals correctly upheld the Board's conclusion that the company did not engage in fraudulent concealment and, therefore, correctly dismissed the unfair labor charges in this case.

IV. The Petition For Certiorari Does Not Present An Important Federal Question.

Petitioners assert that this Court should issue a Writ of Certiorari in this case because the decisions below "involve important questions of federal law concerning the authority of respondent, National Labor Relations Board (board), to interpret and apply equitable tolling standards to a borrowed federal statute of limitation." Petition at 3. Even a cursory examination of the Petitioners' asserted reasons, however, reveals that this case does *not* present an important federal question which warrants review by this Court. To the contrary, this case involves deference by a court of appeals to an agency's reasonable interpretation and the decision below is faithful to the well-established principles set forth in *Chevron* and its progeny (*see* Argument II B, *supra*). Whether there

exists a standard, in other contexts, for defining fraudulent concealment for tolling purposes which allegedly "states the better principle" than the standard adopted by the Board is not an adequate basis upon which to grant certiorari. It is well-established that the proper inquiry is not whether the Board's standard is the "better rule of law," but whether the Board's standard is reasonable. *Chevron*, 467 U.S. at 866. As fully set forth above, and as confirmed by the court of appeals, the Board's standard is a reasonable interpretation of the NLRA and its findings of fact are adequately supported by substantial evidence of record. Accordingly, there are no "compelling reasons" for granting certiorari in this case.

CONCLUSION

For the reasons set forth above, Intervenor, Brown & Sharpe, respectfully requests that this Court deny Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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